No. 02-736

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

A.E. STALEY MANUFACTURING COMPANY,

Petitioner,

v.

DELLWOOD FARMS, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST PURSUANT TO RULE 29.6

Petitioner A.E. Staley Manufacturing Company's ("Staley") parent company is Tate & Lyle PLC, a British-based publicly traded company.

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REASONS FOR GRANTING THE PETITION

Respondents' Opposition Brief ("Opp.") begins and ends with a fundamental error by asserting that the panel below concluded that the proffered evidence was "more consistent" with conspiracy than competition. Opp. at i. The panel *never reached this conclusion*; at each turn, it determined the economic and non-economic evidence was ambiguous and equivocal. More importantly, the panel did not even attempt to apply the proper legal standard necessary to determine whether the admittedly ambiguous, circumstantial evidence tends to exclude the possibility that respondents acted in their independent self-interests under *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Rather, in direct conflict with this Court and other circuits, upon finding that all of the evidence was ambiguous, the panel applied the analytical brakes – it never attempted to determine whether the evidence, individually or as a whole, tended to exclude the possibility that defendants' business practices, such as parallel pricing, were contrary to independent action and unilateral self-interest.

The application of the proper standard on summary judgment is often dispositive of the litigation. The HFCS market, as with scores of mature oligopolies, can have a structure that the panel rightly described as "auspicious" for price fixing (*e.g.*, high concentration, parallel pricing, relatively stable shares). App. at 86a. Precisely for this reason, in a case built entirely on circumstantial evidence it is essential to apply *Matsushita* faithfully and vigorously to distinguish between lawful, tacit collusion and unlawful, explicit agreements. Review is also critical at this stage given the enormous financial stakes involved in nationwide antitrust cases and the prospect of treble damages. Left unreviewed, the panel's new legal standard will allow

ambiguous evidence to defeat summary judgment in the Seventh Circuit (and probably beyond). Companies engaging in lawful, oligopolistic behavior will be pressured to settle dubious litigation to avoid the increased risks created by the panel's new legal standard. As a result, this Court will be deprived of the opportunity for meaningful review or to affirm the vital *Matsushita* standard.

A. The Seventh Circuit's Decision Directly Conflicts With This Court's Precedent

Respondents contend that the panel applied the proper *Matsushita* standard, if not in name then in substance. A court need not recite a specific litany of "magic words" in order to demonstrate its adherence to and application of a legal standard, provided that the substance of the standard is evident and actually applied. *See, e.g.*, *Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring); *Carlson v. Green*, 446 U.S. 14, 19 n.5 (1980). The panel plainly failed to apply either the specific words of the *Matsushita* standard or its determinative substance.

There is no doubt that all of the economic evidence is ambiguous and equally consistent with competition. The panel below concluded that "all of this [economic] evidence is *consistent* with the hypothesis that they had a merely tacit agreement, which at least for purposes of this appeal is not actionable under section 1 of the Sherman Act." App. at 86a (emphasis added). Respondents agree. Opp. at 2 (the Seventh Circuit's economic evidence "findings were *not* the court's basis for deciding summary judgment was unwarranted"); Opp. at 6 ("because the court below found all this [economic] evidence was consistent with a tacit agreement, it did not reverse the grant of summary judgment on that basis"). As such, the economic evidence cannot defeat summary judgment. *Matsushita*, 475 U.S. at 588.

Consequently, the case turns on the import of the non-economic evidence, consisting of several isolated, even "innocuous," statements and a few snippets in documents among the vast discovery record. The panel and respondents rely on this non-economic evidence to explicate the admittedly ambiguous economic evidence. Respondents place heavy emphasis on the panel's assertion that the non-economic evidence is "highly suggestive" of a conspiracy, arguing that this equates to application of the required "tends to exclude" standard and satisfaction of *Matsushita*. Opp. at 3. However, the phrase carved out by respondents ignores the balance of the panel's statement: "The [non-economic] evidence is not conclusive by any means – there are *alternative* interpretations of every bit of it ... ." App. at 90a (emphasis added).

This characterization – alternative explanations – is equivalent to stating that the evidence is "ambiguous," *i.e.*, "conduct as consistent with permissible competition as with illegal conspiracy," *Matsushita*, 475 U.S. at 588. This conclusion requires a thorough analysis to determine whether it tended to exclude the possibility that defendants acted in pursuit of their legitimate, independent self-interests. *Id.* at 574. But the panel declined to do so, concluding instead that ambiguous evidence plus conjecture is now sufficient to create a triable issue. This constitutes a fundamental departure from the Court's precedent.

Shaking hands with the reality of flimsy record evidence,[1] respondents argue that it must be viewed as a

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[1] Respondents argue that "there are degrees of ambiguity." Opp. at 11. But under *Matsushita* and its progeny, evidence is either ambiguous or not, and if it is ambiguous, the mandates of *Matsushita* and the "tends to exclude" standard apply with equal force.

whole and, when so viewed, that the character of the ambiguous economic evidence and the equivocal non-economic evidence is somehow transformed and meets the *Matsushita* standard. Opp. at 13-14. Consistent with *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 699 (1962), however, both the district court and the court of appeals below analyzed the evidence individually "without wiping the slate clean after scrutiny of each" and found that the economic and the non-economic evidence was equivocal and ambiguous.

Where, as here, each of the individual pieces of evidence is ambiguous, then the same result must obtain when that evidence is viewed together as a whole. *See In re Potash Antitrust Litig.*, 954 F. Supp. 1334, 1389 (D. Minn. 1997) (although "the whole can be greater than the sum of its individual parts," viewing the evidence as a whole "can claim no synergistic enhancement 'from a number of acts none of which' tend to exclude the real possibility of independent action") (citation omitted), *aff'd sub nom., Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8th Cir. 2000) (en banc); *American Floral Servs., Inc. v. Florists' Transworld Delivery Ass'n*, 633 F. Supp. 201, 215 n.23 (N.D. Ill. 1986) ("it requires no sophistication in mathematical theory to recognize that zero plus zero plus zero still equals zero").

The panel was required, but clearly failed, to go further and determine whether respondents presented evidence that tends to exclude the possibility that defendants acted in their independent self-interests. *Matsushita*, 475 U.S. at 588. By defaulting the issue, the Seventh Circuit departed from this Court's precedent and created a new standard, holding that ambiguous evidence plus conjecture is now sufficient to defeat summary judgment. The opinion below begs for this Court's

immediate review because it is completely at odds with *Matsushita* and *Monsanto*.

B. The Seventh Circuit's Decision Directly Conflicts With Decisions of Other Circuits

The panel's decision also is in direct conflict with a clear line of cases from the circuit courts of appeals that heretofore faithfully applied *Matsushita* as set forth in Staley's Petition. Respondents' six-page attempt to limit a few of these decisions to their facts misses the point. Rather, each of the cases illustrates the proper application of *Matsushita* in practice and the analysis required to determine whether proffered evidence tends to exclude the possibility of independent, self-interested action.

For example, then-Judge Kennedy in *Richards v. Nielsen Freight Lines,* 810 F.2d 898 (9th Cir. 1987), explained:

> In antitrust cases, the analysis *** permits a defendant to rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice. Once a defendant has met this initial burden, a plaintiff must provide specific factual support for its allegations of conspiracy tending to show that the defendant was not acting independently.

Id. at 902 (citations omitted). *See also In re Citric Acid Antitrust Litig.*, 191 F.3d 1090, 1094 (9th Cir. 1999) ("the defendant can 'rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice'" and "[t]he burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not

engaging in permissible competitive behavior") (citing *Richards*). Likewise, the Tenth Circuit applies a two-part, burden-shifting inquiry to determine whether summary judgment is appropriate in an antitrust conspiracy case:

> (1) is the plaintiff's evidence of conspiracy ambiguous, *i.e.*, is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests.

Gibson v. Greater Park City Co., 818 F.2d 722, 724 (10th Cir. 1987). *See also Riverview Invs., Inc. v. Ottawa Communication Improvement Corp.*, 899 F.2d 474, 483 (6th Cir. 1990) (applying *Gibson*'s two-part test). Similarly, the Second Circuit has articulated the *Matsushita* test as a shift in burdens:

> [A]s the district court correctly concluded, defendants established conduct that is consistent with permissible activity, requiring plaintiffs to come forward with evidence "that tends to exclude the possibility of independent action *** ."

H.L. Hayden Co. of New York v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1014 (2d Cir. 1989) (citing *Monsanto*).

Like the Second, Sixth, Ninth, and Tenth Circuits, numerous other circuits have applied *Monsanto* and *Matsushita* to systematically and vigorously assess the record evidence, generating scores of pages of burden-shifting analysis. *See, e.g., Blomkest*, 203 F.3d at 1032 (8th Cir. 2000) (en banc) (requiring plaintiffs to present evidence that "tends to exclude" permissible activity); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999) (requiring plaintiffs to present "evidence that is

sufficiently unambiguous" showing that defendants conspired); *City of Tuscaloosa v. Harcros Chems.*, 158 F.3d 548, 570-571 (11th Cir. 1998) (requiring plaintiffs to present evidence "tending to establish" that defendants were engaged in "collusive agreement").

In stark contrast, the panel below stated – without explanation or citation – that "[t]he question is simply whether [the respondents' non-economic] evidence, considered as a whole and in combination with the economic evidence, is sufficient to defeat summary judgment." App. at 87a. After concluding that all of the respondents' economic evidence "is consistent with the hypothesis that [petitioners] had a merely tacit agreement," the court "summarized" the non-economic evidence, concluding flatly that "[t]he evidence is not conclusive by any mean – there are *alternative interpretations* of every bit of it – but it is highly suggestive of the existence of an explicit though of course covert agreement to fix prices." *Id.* at 90a (emphasis added).

The panel not only failed to recite the applicable standard, it categorically declined its application. One leading commentator in the antitrust field has highlighted the panel's unmistakable break with the other courts of appeals:

> Here, Judge Posner parts company with numerous circuit decisions that continue to impose high evidentiary requirements even in 'plausible offense' situations. Under Posner's approach, once one determines that the market is conducive to collusion, little or nothing in the way of additional 'explicit' evidence of collusion is required.

See Herbert Hovencamp, *Book Review: The Rationalization of Antitrust Law*, 116 HARV. L. REV. 917, 926 (2003) (citing panel's opinion).[2]

The panel's decision below is out of step with the other circuit courts of appeals that have consistently applied this Court's precedent. The Seventh Circuit now forges a new path, marching to its own discordant drum. Certiorari is required to resolve this newly-created conflict.

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[2] This Court in *Matsushita* confirmed that the "tends to exclude" standard applies even where the economic motive is reasonable, so-called 'plausible offense' cases:

> We do not mean to imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto* [] establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support an inference of conspiracy.

475 U.S. at 597 n.21 (citations omitted).

CONCLUSION

For the foregoing reasons, as well as those reasons set forth in Staley's petition, this Court should grant Staley's petition for certiorari.

Respectfully submitted,

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